

# **A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education**

BARBARA BENNETT WOODHOUSE\*

## **I. A NEW CHAPTER IN THE POLITICS OF PARENTAL RIGHTS**

### ***A. Defining the Public Nature of Parenthood and the Government's Proper Role in the Private Family***

The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>1</sup>

The role of parents in the raising and rearing of their children is of inestimable value and is deserving of praise and protection by all levels of government . . . .”<sup>2</sup>

As these quotations suggest, the notion that the work of parenthood is both a right and a duty, endowed with special public value, is nothing new. Similarly, tensions between the public role of parenthood and the privacy of the family, between public support for responsible parenting and public intervention in irresponsible parenting, have figured prominently in American politics for at least three quarters of a century. Others will be speaking about public responsibility for meeting children's economic needs. I would like to address children's needs for responsible parenting and the continuing struggle to reach an appropriate balance between public and private roles in meeting these basic needs and in preparing children for citizenship. I have written about this topic before, from an historical perspective, and from a theoretical perspective. In an article which took its title, *Who Owns the Child?*, from turn of the century pamphlets opposing child labor laws, I examined *Meyer v. Nebraska*,<sup>3</sup> and *Pierce v. Society of Sisters*,<sup>4</sup> two foundational cases dating from the 1920s which identified a parent's right to custody and control of his

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\* Professor of Law, University of Pennsylvania School of Law. My thanks to Amy Bliss, J.D., 1997, for valuable research assistance.

<sup>1</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (McReynolds, J., writing for a unanimous court).

<sup>2</sup> Proposed Parental Rights and Responsibilities Act of 1995, H.R. 1946, 104th Cong., 1st Sess. § 2(a)(2) (1995) (findings).

<sup>3</sup> 262 U.S. 390 (1923).

<sup>4</sup> 268 U.S. 510 (1925).

or her children as a fundamental substantive right protected by the Fourteenth Amendment.<sup>5</sup> I placed these cases in historical context, relating them to the *Lochner*<sup>6</sup> line of economic substantive due process cases and to progressive reformers' battles both against child labor and in favor of public education and child protection laws. Interwoven with the themes of family privacy and family freedom which have made *Meyer* and *Pierce* famous, I detected other themes reflecting theories of economic due process. There is a dark side of *Meyer* and *Pierce*, which promotes a view of the child as the parent's private property, existing essentially outside the domain of social concern or legitimate state authority. This notion impeded development of early child protective laws, and remains alive in modern cases and controversies about adoption, custody, religion, education, and medical care. In many of these contexts, courts citing *Meyer* and *Pierce* have treated biological parents' rights as virtually absolute, outweighing children's basic needs for responsible parenting.

In *Hatching the Egg*, and other articles,<sup>7</sup> I have argued that parental rights should be reconceptualized as flowing from parents' responsibilities, and that parenthood is not a form of ownership but rather of stewardship of children.<sup>8</sup> I have suggested a scheme of children's "needs-based rights," conceptualized not as rights of autonomy but as rights to receive basic nurture and protection, not only from their parents but also from their communities, states, and nations. Although child-rearing is rightly entrusted to parents and family members as those who presumptively value, love, and know their children best, I have argued that laws and policies must recognize children as people in their own right. As future citizens, their welfare should be the law's central concern in allocating adult power over children. Affording legal protection to the rights of

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<sup>5</sup> Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer* and *Pierce* and the *Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

<sup>6</sup> *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* was overruled by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which signaled the end of an era in which a conservative majority dominated the Supreme Court, blocking New Deal child labor laws and other social and economic legislation as exceeding federal powers and infringing private rights of property and liberty.

<sup>7</sup> See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993); Barbara Bennett Woodhouse, *Out of Children's Needs, Children's Rights: The Child's Voice in Defining the Family*, 8 B.Y.U. J. PUB. L. 321 (1994).

<sup>8</sup> For a provocative discussion of the pros and cons of a trust or stewardship model, see Robert Scott & Elizabeth Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995); Carl E. Schneider, *On the Duties and Rights of Parents*, 81 VA. L. REV. 2477 (1995); Barbara Bennett Woodhouse, *Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action*, 81 VA. L. REV. 2493 (1995). Others arguing for an emphasis on parent's responsibilities rather than parent's rights include Katharine Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11 (1994).

privacy and autonomy, which parents need to carry out their responsibilities, serves both the interests of children and the interests of a larger community.

This child-centered description of parents' rights and their legal foundations raises serious concerns among religious and political conservatives who view parents' rights as natural rights antedating the State, and as such, far more absolute and inalienable than my instrumentalist description supposes. In researching the history of American family policy, I identified these same concerns in the debates raging around the turn of the century and into the nineteen-thirties about the balance of public and private interest in children. Parents and citizens voiced concern that laws banning child labor, mandating compulsory education, requiring vaccination, and establishing children's right to protection from abuse were improper and unnecessary usurpations of the God-given authority of parents to direct their children's upbringing. Today, we see the same anxieties and the same tensions reflected in public debates over family values, children's rights, state intrusions on family prerogatives, and a new drive towards privatization of the family.

In this paper I will explore these issues in a highly immediate and contemporary context. I will focus on a recent piece of proposed legislation, the Parental Rights and Responsibilities Act of 1995.<sup>9</sup> On October 26, 1995, I testified in opposition to this legislation before the House Judiciary Committee's Subcommittee on the Constitution. I believe the House Bill's genesis and life course will provide an instructive new chapter in the perils and politics of child protection and public education.

Why do I find the House Bill worth writing about, knowing it may represent a mere footnote in history if it is defeated, as I hope it will be? First, this Bill exposes the interplay between public and private actors, individual and group interests, urban and rural communities, middle class and the poor in the creation of family policies. It also illustrates the importance to children of a balanced and collaborative partnership between parents and government. It exposes complex relationships and tensions between majority rule and minority or individual rights, especially as they play out in movements to gain control of public institutions involved in the rearing of children. And it demonstrates the fallacy of adopting either a purely public or a purely private definition of the family or of American family policy. I also expect that the life course of the House Bill will have much to teach about the challenges faced by children's advocates in defending the notion of a public stake in the private family—a task that requires vigorously swimming upstream even in generous times and, in times like these, requires battling against the tide of privatization affecting virtually every other sphere of government activity.

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<sup>9</sup> H.R. 1946, 104th Cong., 1st Sess. (1995). Throughout the remainder of this paper, I will refer to this proposed legislation simply as "the Bill."

*B. The Proposed Parental Rights and Responsibilities Act of 1995: What Does it Say and What Does it Do?*

The Parental Rights and Responsibilities Act of 1995, subtitled "A Bill to protect the fundamental right of a parent to direct the upbringing of a child," was introduced on June 28, 1995, as H.R. 1946, by Congressman Largent, a Republican of Oklahoma, and Congressman Parker, then a Democrat of Mississippi.<sup>10</sup> Virtually identical legislation was introduced as S. 984 by Republican Senators Grassley of Iowa, Lott of Mississippi, Helms of North Carolina, and Cochran of Mississippi.<sup>11</sup> Its drafters made no claim to either novelty or originality. In fact, the substantive features of the House Bill were portrayed as a concise summary of existing Supreme Court precedents protecting parents' rights.<sup>12</sup> The drafters argued that lower courts were misinterpreting the constitutional precedents. They claimed that the Bill was needed to clarify the law and as a remedy against those courts and government agencies which intruded on parents' rights by misreading or ignoring these precedents.

The original Bill as presented to Congress was quite concise and is set out in its entirety in Appendix A. The Bill begins, "Congress finds that the Supreme Court has regarded the right of parents to direct the upbringing of their children as a fundamental right implicit in the concept of ordered liberty within the 14th Amendment to the Constitution of the United States, as specified in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)."<sup>13</sup> The Bill goes on to find that "the tradition of western civilization recognizes that parents have the responsibility to love, nurture, train, and protect their children," but that "parents face increasing intrusions into their legitimate decisions and prerogatives by government

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<sup>10</sup> 141 CONG. REC. H6481 (daily ed. June 28, 1995). Congressman Parker has since become a member of the Republican Party. *Rep. Parker of Mississippi Switches to GOP*, WASH. POST, Nov. 11, 1995, at A6.

<sup>11</sup> S. 984, 104th Cong., 1st Sess. (1995); 141 CONG. REC. S9421 (daily ed. June 29, 1995).

<sup>12</sup> See Letter of May 1, 1995 from Reps. Largent and Parker addressed "Dear Colleague," and titled "Re-Affirm America's Parents, Become an Original Co-Sponsor of The Parents Rights Act of 1995" (on file with author) [hereinafter House Sponsors' Letter].

<sup>13</sup> H.R. 1946, 104th Cong., 1st Sess § 2(a) (1995). Both of the cited cases affirmed parents' rights to direct children's private or parochial education. *Meyer* overturned laws in various states that prohibited the teaching of foreign languages in private and parochial schools and *Pierce* invalidated an Oregon initiative which mandated that all children up to eighth grade must be educated in public as opposed to private or sectarian schools. The Court in both cases also discussed parents' rights to the control and custody of children. *Meyer* and *Pierce* have become the foundation cases in the process of constitutionalizing a wide range of parental powers.

agencies in situations that do not involve traditional understandings of abuse and neglect but are simply a conflict of parenting philosophies.”<sup>14</sup> It finds that “some decisions of the Federal and State courts have treated the right of parents not as a fundamental right but as a nonfundamental right.”<sup>15</sup> It creates a remedy, in the form of a federal cause of action, which can be brought in either state or federal courts, either as a defense or as a separate claim, with attorneys fees to be awarded to a victorious plaintiff.<sup>16</sup> It sets forth a series of steps to guide courts in the adjudication of such claims.<sup>17</sup> Once the parent has demonstrated that the government has interfered with or usurped a parental right, the burden of persuasion and production shifts to the state to demonstrate that it is adopting the “least restrictive means of accomplishing the compelling [governmental] interest.”<sup>18</sup>

The Bill purports to exempt from its scope interventions based on the government’s compelling interest in child health care and the protection of children from abuse and neglect. However, it also would narrow these exemptions by stipulating that they only apply in cases involving medical decisions creating the risk of death or “serious physical injury,”<sup>19</sup> and to traditional definitions of abuse and neglect. It states that parents’ rights include the right to administer “reasonable corporal discipline” subject to the exception for abuse and neglect.<sup>20</sup> It also exempts domestic relations custody disputes between parents, and any other disputes between parents.<sup>21</sup> In a key provision that its sponsors characterize as restating prevailing constitutional doctrine, the Bill specifies that the government must show probable cause in cases in which the government seeks a temporary or preliminary action or order, with the exception of cases which terminate parental custody or visitation. Cases in which the government seeks a final action or order, or in which it seeks to terminate parental custody or visitation, must be proved by clear and convincing evidence.<sup>22</sup>

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<sup>14</sup> H.R. 1946, § 2 (a) (3), (5).

<sup>15</sup> *Id.* § 2 (a)(4).

<sup>16</sup> *Id.* §§ 6, 8.

<sup>17</sup> *Id.* § 2(b)(6).

<sup>18</sup> *Id.* § 2 (b)(6)(B)(ii).

<sup>19</sup> *Id.* § 3(4)(b).

<sup>20</sup> *Id.* § 3(4)(A)(III).

<sup>21</sup> *Id.* § 7.

<sup>22</sup> *Id.* § 3(1)(A),(B). This language is confusing, but it seems to require an unusually high standard for the kinds of protective emergency interventions often obtained by temporary restraining or removal orders based on hotline calls or reports from mandatory reporters. *See infra* notes 39–40 and accompanying text.

### C. *The Genesis of Federal Parents' Rights Legislation*

The Parental Rights and Responsibilities Act did not originate on Capitol Hill. Much of it was drawn almost verbatim from a book titled *A Contract with the American Family: A Bold Plan by the Christian Coalition to Strengthen the Family and Restore Common-sense Values*.<sup>23</sup> The concept of federal parental rights legislation was a key part of the Christian Coalition's project of putting forward a family focused agenda that would provide a fitting family values and individual responsibility complement to the economic and budgetary agenda of the Republican's "Contract with America." In addition to a chapter on "Protecting Parental Rights," the *Contract with the American Family* included chapters on "Restoring Religious Equality," "Promoting School Choice," "Restoring Respect for Human Life," "Punishing Criminals, Not Victims," "Privatizing the Arts," and other family values issues. The Christian Coalition viewed legislation which restored parental rights as a necessary response to a crisis situation and an important corrective for years of liberal secular influence.<sup>24</sup> The *Contract with the American Family* gained significant support from conservative groups like the Family Research Council, the Rutherford Institute, and Speaker of the House Newt Gingrich.<sup>25</sup> A growing home schooling movement may have influenced the drafters of the Bill. The Bill specifically acknowledges parents' responsibilities to educate their children "for the purposes of literacy and self sufficiency"—suggesting a special concern with home schooling by citing the case of *Wisconsin v. Yoder*, a precedent which allowed an exception to compulsory public schooling within the Amish community.<sup>26</sup>

The House Bill raised opposition among mainstream groups such as the Child Welfare League of America (CWA) and the National Parent Teacher Association (PTA). The CWA argued it would hamper efforts to protect children from abuse.<sup>27</sup> The PTA stressed its view that government should

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<sup>23</sup> CONTRACT WITH THE AMERICAN FAMILY: A BOLD PLAN BY THE CHRISTIAN COALITION TO STRENGTHEN THE FAMILY AND RESTORE COMMON-SENSE VALUES (1995).

<sup>24</sup> Another measure aimed at correcting secular influence advocated by the Christian Coalition was the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-1 to -4 (Supp. V 1993), which restored the compelling interest test for the courts' review of free exercise cases. The Act was passed in response to *Employment Div. v. Smith*, 494 U.S. 872 (1990), which held that a criminal law of general application which is neutral toward religion will not be subjected to heightened scrutiny nor will the government be required to offer an exemption for those whose religious observance is burdened by the law. The Christian Coalition had viewed this decision as creating a crisis for the free exercise of their religious beliefs.

<sup>25</sup> See e.g., Laurie Goodstein, *Gingrich Vows to Pursue Christian Coalition Agenda; Gingrich Vows Action on Group's "Blueprint,"* WASH. POST, May 18, 1995, at A1.

<sup>26</sup> 406 U.S. 205 (1972).

<sup>27</sup> Letter from Child Welfare League of America (Oct. 25, 1995) (opposing H.R.

support families and children by providing opportunities that help parents better fulfill their roles as nurturers, teachers and disciplinarians. The PTA criticized the Bill as erecting barriers to cooperation, collaboration and partnership between public institutions and families.<sup>28</sup> Many members of Congress, however, publicly supported the Christian Coalition's contract. It drew fire from many other religious groups, including Christian groups who explicitly rejected its vision of the Christian ethic and of the appropriate role of religion in political life.<sup>29</sup>

This Bill is not an isolated phenomenon. According to its supporters, similar legislation has been introduced in half the states.<sup>30</sup> The House Bill, in common with the "Contract with America" and other provisions in the *Contract with the American Family*, also reflected a more generalized concern among conservatives about a national erosion of personal responsibility. Critics of liberal social programs are concerned not only about protecting private rights to the control and education of children, but also about enforcing private responsibilities for the maintenance and support of children. The House Bill presents the other side of the coin of privatization of family supports sought by proposed welfare reforms and child support enforcement initiatives. These more highly publicized and sweeping welfare reforms attempt to enforce individual responsibility for children by collecting money from deadbeat noncustodial parents and shifting the costs of child-rearing back to "irresponsible" custodial parents—the welfare mothers who cannot afford to raise but continue to produce children. The cost shifting is accomplished through reductions or eliminations of various former "entitlement" programs such as AFDC, SSI and Medicaid, as well as other programs for poor children and families, including Food Stamps and the Women Infants and Children Program (WIC). One major motivator behind these types of welfare reform is a concern with the erosion of the "family values" of individual responsibility and family self-sufficiency. Recently, commentators and scholars of all political stripes have contended that the state has taken over many, if not most, of the critical family functions.<sup>31</sup> The Bill's proponents sought to recapture a host of

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1946) (on file with author).

<sup>28</sup> Vicki Rafel, National Parent Teacher Association, Testimony before the House Judiciary Committee, Subcommittee on the Constitution (Oct. 26, 1995), *available in* LEXIS, Legis Library, Cngtst File.

<sup>29</sup> *See, e.g.*, Goodstein, *supra* note 25, at A1.

<sup>30</sup> *See* Howard Davidson & Carolyn Weiss, The Proposed Federal Parental Rights and Responsibilities Act 2 (July 12, 1995) (legislative analysis by ABA Center on Children and the Law) (on file with author).

<sup>31</sup> *See, e.g.*, Mary Ann Glendon, *Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations*, 1993 B.Y.U. L. REV. 385 (1993); David Poponoe, *Family Decline in America*, in *REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY* 39 (David Blankenhorn et al. eds., 1990);

areas they believed were being usurped by governmental entities—from abortion decisions to educational decisions, from disciplinary punishment to religious training.<sup>32</sup> Thus, at the same time as conservatives seek to reduce public financing of the private family, the Bill seeks to reduce public regulation of or intrusion into the private family, by empowering “responsible” parents in their attempts to take back or defend the family’s critical functions.

*D. Why a Federal Cause of Action?: Conservatives’ Sacrifice of Federalism to Combat a National and International Threat*

Ironically, the House Bill’s proponents concluded that, in addition to existing constitutional doctrines, a new federal cause of action providing attorneys fees for victorious parents was necessary to insure that parental rights were not violated by local government.<sup>33</sup> I say ironically because, in general, contemporary conservatives favor localization and shrinking of government power and advocate the return of federal tax moneys to regional control. They also tend to oppose the notion of awards of attorneys fees as creating a cadre of private attorneys general who can use civil rights legislation to force concessions from local government. The economic and budget terms of the Republican “Contract with America”<sup>34</sup> seek to return economic control to the states and rely heavily on the mechanism of block granting federal tax moneys. Defined broadly, block granting means that federal funds that formerly were allocated at the federal level among specific social welfare programs for families, elders, and children would now be distributed by states according to local priorities and policies. Conservatives, philosophically opposed to “big government” and federal control, contended that these decisions were more efficiently and properly made at the local level, with maximum flexibility for state and local government.

In light of the new majority’s commitment to federalism, decentralization of power, and state and local control, it struck many observers as anomalous that the vehicle chosen by the conservative majority to accomplish the goals of protecting parents’ authority should be the creation of a new federal layer of

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MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); MILTON REGAN, *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993).

<sup>32</sup> H.R. 1946, § 3 (4)(A) states that the “‘right of a parent to direct the upbringing of a child’ includes, but is not limited to” the rights to direct the child’s education, make health care decisions, discipline the child, and provide religious teaching. The examples of improper intervention included cases involving reproductive decisions, abortion, condom distribution, values education in schools, cases finding abuse and/or neglect, and decisions regarding medical care. See House Sponsors’ Letter, *supra* note 12; see also *infra* part II.

<sup>33</sup> See Davidson & Weiss, *supra* note 30, at 2.

<sup>34</sup> NEWT GINGRICH ET AL., *CONTRACT WITH AMERICA* (1994).



oversight of these traditionally local government functions of education, health and child protection.<sup>35</sup> Critics of the Bill pointed out this anomaly and argued that the Bill would concentrate additional authority in federal courts and would tend to undercut the freedom of states—as “laboratories” of the democratic process—to construct their own localized solutions to the problems of responsible and irresponsible parenting. Conservatives, however, considered federal legislation necessary to combat a crisis situation. The Bill was intended to protect parental prerogatives not only against domestic, but also against foreign enemies. Although international children’s rights laws are not explicitly mentioned in H.R. 1466, many of its proponents believed the Bill’s provisions would provide a strong brake against adoption by the United States of the 1989 United Nations Convention on the Rights of the Child (the “Convention”).<sup>36</sup> The Christian Coalition’s *Contract with the American Family* lumped its proposal for a parental rights legislation and its strong opposition to the Convention into one chapter. Many critics view the Convention’s provisions regarding children’s religious and intellectual freedom, children’s freedom of speech, education, and conscience with alarm. While the Convention’s supporters claim it is a statement of “ideals and principles” designed “to promote the well-being and protect the basic rights of children throughout the world,” its detractors claim it substitutes a theory of parenthood as a form of trusteeship for a traditional theory of parents’ rights as God given or natural rights. They view the Convention, with its emphasis on children’s evolving capacities and statements about parents’ duties to exercise their parental rights in furtherance of their children’s rights and interests, as posing serious threats to parents’ authority to control children’s upbringing and to determine with whom they associate and how they are educated.<sup>37</sup>

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<sup>35</sup> Marty Guggenheim, Professor of Law, New York University School of Law, Testimony before the House Judiciary Committee, Subcommittee on the Constitution (Oct. 26, 1995), available in LEXIS, Legis Library, Cngtst File (commenting that he thought the legislation was a “parody” on first reading).

<sup>36</sup> As of June 1995, the U.N. Convention on the Rights of the Child had been ratified by 174 nations, leaving the U.S. as the only major industrialized nation to withhold its endorsement. President Clinton signed the Convention in February 1995 and announced at that time he would send it to the Senate for ratification. See White House Statement on President’s Decision to Sign United Nations Convention on the Rights of the Child, 31 WEEKLY COMP. PRES. DOC. 229 (Feb. 13, 1995).

<sup>37</sup> See, e.g., Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Rights*, FIRST THINGS 18–24 (Aug./Sept. 1995) (quoting from statements by President Clinton’s administration and others). Bruce Hafen is the Dean of Brigham Young University’s J. Ruben Clark School of Law, associated with the Church of the Latter Day Saints or Mormon faith. Another articulate critic of the burgeoning attention given to children’s rights is Professor Lynn Wardle, also of Brigham Young University. See Lynn Wardle, *Family Law in Practice and Theory*, 45 OHIO ST. L.J. 499 (1984).

## II. EVALUATING THE CLAIMS OF THE BILL'S PROPONENTS

### A. *Do the Cases Cited by the Bill's Proponents Show Increasing State Intrusions on Parental Rights?*

Let me turn from my description of the political context and motivations of the House Bill's supporters to discuss some of the claims that its supporters raised to justify a new federal cause of action. A number of fliers, case summaries, and other documents were used to illustrate the shortcomings of current case law.<sup>38</sup> Many of the cited cases had become notorious in conservative circles and among the religious right as examples of shocking inroads on parental powers. Some of these cases, such as *In re Sampson*,<sup>39</sup> in which a court ordered a blood transfusion to allow surgery on a disfigured fifteen year old, and *E.Z. v. Coler*,<sup>40</sup> in which Illinois parents and children challenged standards for emergency searches following hotline reports of abuse, will be familiar to those of you who teach family and children's law or litigate cases involving children's medical care and protection from abuse, although you might not recognize them as described by the Bill's proponents. The Bill's supporters characterized *E.Z. v. Coler*, for example, as standing for the proposition that parents are deemed to consent to warrantless searches of their homes without probable cause, by permitting child abuse investigations without objecting at the time.<sup>41</sup> In fact, this holding was overturned on appeal. The appeals court upheld the state's power to make warrantless searches on less than probable cause, on the basis that these were not criminal searches but emergency administrative searches that were necessary to protect children's lives and safety. As for the manner and circumstances of the searches, many troubling issues raised by the plaintiff parents and children had become moot by the time of appeal, since the agency had amended its handbooks and policies to increase protections of children's and families' privacy. In my classes, I use this case to teach how advocates for families can use class action suits to force needed change upon a stubborn bureaucracy even if they do not actually appear to be "winning" in court. If anything, it illustrates the effectiveness of current

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<sup>38</sup> See "Current and Recent Case Law Regarding Parental Rights" and "Talking Points for the Parents Rights Restoration Act of 1995", documents made available to the public and the press by the House Bill's supporters through the House Press Gallery in June, 1995 (on file with author).

<sup>39</sup> 65 Misc. 2d 658, 317 N.Y.S.2d 641 (1970), *aff'd*, 37 A.D.2d 668, 323 N.Y.S.2d 253 (3rd App. Div. 1971), 29 N.Y.2d 900, 278 N.E.2d 918 (N.Y. 1972).

<sup>40</sup> 603 F. Supp. 2546 (N.D. Ill. 1985), *aff'd sub nom.* Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986). I use this case in my classes to illustrate how family advocates can act as agents for change in an unresponsive bureaucratic system by bringing litigation that forces the agency to confront its shortcomings and voluntarily change its procedures.

<sup>41</sup> See Current and Recent Case Law, *supra* note 38.

remedies.

The Bill's supporters characterize the *Sampson* case as standing for the proposition that the State can enter a finding of neglect against a parent and order dangerous cosmetic surgery over the parent's objection even though the risk would be decreased by delaying the surgery.<sup>42</sup> As those who have taught this case or used it in litigation will recognize, this is a rather over-simplified description of a complex case. In fact, the trial court found that the boy's disfigurement was so hideously repulsive that it had prevented him from developing psychologically and cognitively. He did not attend school and was virtually illiterate. The boy's doctors were unanimous that waiting until he was twenty-one to correct his gross disfigurement would render virtually nil his chances for a normal life. His mother, a Jehovah's Witness, had authorized the needed surgery, but had refused permission for necessary blood transfusions. The court ordered the blood transfusions over the parent's and the child's objections, stressing the severe and permanent harm the child would suffer if the surgery did not go forward. Casebooks use this famous case not to illustrate that courts will lightly overrule parents' medical decisions, but rather to explore the hard choices courts must make between protecting children and protecting religious and parental autonomy. It illustrates the costs to parents' and children's autonomy of attempting to protect children from decisions, their own as well as their parents', that appear sincerely made, but which are objectively irresponsible and impose risks of severe and permanent detriment.<sup>43</sup> Finally, it illustrates that attempts to maintain bright line boundaries by drawing the line at physical risk or physical harm are ultimately illusory in light of modern medical and scientific knowledge about the interplay between children's physical, emotional, and cognitive development.<sup>44</sup>

On closer examination, the holding and facts of many of the cases cited by the Bill's proponents simply do not support the charge of improper intervention. For example, two cases involving abuse and neglect were offered as proof that parents' rights were being arbitrarily and improperly usurped by child protective agencies.<sup>45</sup> The courts were characterized as removing children from their parents because of disagreements over house rules or parenting philosophy. To the contrary, these cases were decided based on fact situations which courts concluded posed serious risks of harm—physical and developmental—to the children. *In re Sumey* is characterized by the Bill's supporters as a case of the State which sides with a rebellious child in her

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<sup>42</sup> *Id.*

<sup>43</sup> See JUDITH AREEN ET AL., LAW, SCIENCE AND MEDICINE 1224 (1984).

<sup>44</sup> If exposure to lead paint and exposure to emotional abuse both have comparable measurable effects on a child's cognitive development, it becomes difficult to claim that one is a physical harm meriting state intervention and the other is not.

<sup>45</sup> *In re Sumey*, 621 P.2d 108 (Wash. 1980); *In re Ray*, 408 N.Y.S.2d 737 (1978).

opposition to her parents' reasonable rules regarding illicit drugs and sex.<sup>46</sup> The case involved a teenage girl whose mother had called the police for fear she would run away. The girl had run away from home on several occasions, and crisis interventions had failed to reconcile the parents and child. The trial court concluded she was seriously at risk—not an unreasonable conclusion given the dangers of exploitation of runaway girls and her mother's call for police intervention. She was placed temporarily in a residential home with counseling services to re-establish a viable family relationship. This case reflects a traditional role of state intervention when children who are legally within parents' control are, in fact, out of control and placing themselves or others at risk.<sup>47</sup>

A second such case, the case of Laura Ray, was portrayed as involving a mother who supposedly lost her child because she opposed psychological counseling.<sup>48</sup> In this case as well, the court heard evidence going far beyond a disagreement over parenting philosophy. Evidence was presented that the mother not only had rejected all attempts to provide counseling or medication for her hyperactive and disturbed child over a period of four years, but had medically, emotionally, and physically neglected and abused the child, including striking her with a baseball bat, to the extent that the child's development had been seriously compromised. On closer examination, these cases involved disputes over the weight the courts attributed to various facts and expert or medical opinions. They do not appear to be applications of bad laws or even misapplications of good laws, and few of the outcomes would be affected by the House Bill. Finally, several of the cases cited by proponents related to areas specifically exempted from the House Bill.<sup>49</sup>

Nevertheless, the cases cited by the Bill's supporters suggest a strong resistance to many current principles of child protective law, including (1) the principle that limited emergency interventions for investigative purposes may be based on evidence that falls short of probable cause, (2) the concept that serious risk of severe psychological or developmental harms may warrant state intervention, and (3) the concept that older children may be placed under state

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<sup>46</sup> See Current and Recent Case Law, *supra* note 38.

<sup>47</sup> See *In re Ronald S.*, 138 Cal. Rptr. 387 (1977) for a case describing the difficulties encountered by one juvenile justice system in dealing with "status offenders"—often teenaged runaways and truants. It is generally recognized that the state has a duty to intervene in cases of runaways or truants even though the children are neither juvenile delinquents subject to involuntary incarceration nor victims of parental abuse and neglect.

<sup>48</sup> *Id.*

<sup>49</sup> *E.g.*, *Gardini v. Moyer*, 575 N.E.2d 423 (Ohio 1991), involved a dispute between a custodial mother and a noncustodial father over home schooling, resulting in a change of custody from mother to father, and thus would be exempted under § 7 of the Bill. H.R. 1946, 104th Cong., 1st Sess. § 7 (1995).

supervision without their parents' consent if the authority structure of the family has broken down, leaving them without "proper parental care and control."

*B. Do Existing Legal Protections of Parents' Rights Fail to Deter Wrongful Interventions?*

Opponents of the Bill, including myself, argued that it was a mistaken response to a few cases with great shock value. While any instance in which a responsible parent is wrongfully accused shocks the conscience, the cases motivating the Bill did not show a real need for additional legislation. Moreover, current state, federal, and constitutional law already provide effective protection of parents' rights. State laws, often backed up by federal laws like the Adoption Assistance and Child Welfare Act (which conditions funding on compliance with various criteria), provide for procedural and substantive protections for parents in areas from abuse and neglect, to education and religious training.<sup>50</sup> In addition, strong constitutional principles reaffirmed repeatedly by the Supreme Court already empowered parents to challenge unlawful acts by government authorities and to receive remedies for constitutional violations.<sup>51</sup> In fact, some of the cases cited by the authors of the Bill show how advocates for parents and children have used remedies such as Section 1983 to challenge state action.<sup>52</sup>

Many attorneys for parents in poor communities, however, complain that their clients are unable to fight the system when enmeshed in a CPS intervention. Staffing of community legal services offices is low and budgets are tight. The Supreme Court has rejected the argument that a right to counsel exists for parents threatened with removal of their children or termination of their parental rights, suggesting that the need for counsel must be evaluated on a case by case basis.<sup>53</sup> Many states and localities provide counsel in such cases, however, in recognition of the fundamental importance of parent-child relationships and the procedural and substantive complexities of CPS

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<sup>50</sup> Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

<sup>51</sup> See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that parents must be afforded due process rights in a termination hearing).

<sup>52</sup> As noted above, the finding in *E.Z. v. Coler*, 603 F. Supp. 1546 (N.D. Ill. 1985), that parents automatically consent to searches of their homes and children if they do not object was reversed on appeal in *Daryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986). Although the court upheld the necessity of emergency searches and inspections based on abuse hotline reports because of the crucial interest in protecting children, its decision was based in part on the agency's having rewritten its handbook to strengthen protections of parent's and children's privacy rights.

<sup>53</sup> *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18 (1981).

proceedings.<sup>54</sup> Legal services offices, currently fighting to maintain federal funding, often represent indigent parents in such cases and might well benefit from a law giving parents a separate cause of action and awarding attorneys' fees to victorious parents. Often, pro bono attorneys or public interest groups represent parents and children in class actions challenging unlawful CPS procedures, and they too might benefit from availability of attorneys' fees.<sup>55</sup> The class of cases most likely to be affected by the attorneys fees provision, however, are those protesting school policies, in which appointment of counsel is rare or nonexistent. Proponents of the legislation stressed parents' frustration at having not only to pay the legal costs of challenges to government usurpations of parental authority, but also at seeing their own tax moneys go to attorneys for the other side.<sup>56</sup> The provision of attorneys' fees would, of course, make resistance more realistic for middle income parents challenging school decisions, not to mention indigent parents faced with loss of custody.

### *C. Does the Bill Simply Restate Existing Laws and Precedents?*

Examination of the legislation in light of the cases cited by its proponents and in light of supporters' testimony suggests that the Bill is not simply a restatement of existing constitutional precedent regarding state interventions in the family. First, it would create barriers to state intervention in emergency cases by raising the standard for *any* intervention—even an emergency removal or a search—to probable cause or clear and convincing evidence. Second, it would confer constitutional protection to forms of parental conduct that currently fall within the definition of abuse and physical, medical, or emotional neglect in many of the fifty states. It does this by excluding them from the Bill's definitions of compelling state interests to protect children from abuse and neglect and by requiring that parental conduct may not be challenged unless it meets the "traditional" definition of abuse and neglect. Third, it would shift the current balance between parents' rights and children's safety by increasing the costs of erroneous interventions without acknowledging the costs in dollars and lives of erroneous failures to intervene. Fourth, it suggests an expansion of parents' rights not only to prohibit schools and other public

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<sup>54</sup> See PRESIDENTIAL WORKING GROUP ON THE NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICAN BAR ASSOCIATION, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 7 (1993) (discussing the unmet legal needs of children and families).

<sup>55</sup> Examples include the ACLU, Philadelphia's Juvenile Law Center, the Children's Rights Division of the New York City Legal Aid Society, and Philadelphia's Support Center for Child Advocates.

<sup>56</sup> George W. Dent, Professor of Law, Case Western Reserve University School of Law, Testimony before the House Judiciary Committee, Subcommittee on the Constitution (Oct. 26, 1995), available in LEXIS, Legis Library, Cngtst File.

entities from imposing compulsory or coercive requirements, but to children's voluntary participation. It envisions a duty on the part of public institutions actively to police children's conduct to assure compliance with their parents' values. And finally, it would introduce confusion into existing systems and alter the dynamic between federal and state power in an area of traditional local concern.

### 1. *The Bill Would Raise the Standard for Emergency Interventions*

The statutory and court systems which are implicated in state intervention in the family are extremely complex. They are marked by overlapping rules of local, state and federal law and involve many different kinds of courts that attempt to address everything from domestic relations custody issues, to adoption, to emergency protection from abuse orders. One family may be involved in simultaneous cases before a domestic relations court, a dependency court, a special court dealing with domestic violence, and a criminal court, all arising out of a single incident. In addition, each forum is applying its own specialized branch of law to the specific aspect of the family's problem that is properly before it.<sup>57</sup> Due to shortages of funds for computerization and coordination of local court systems, these various judges may not even know that they are entering overlapping or inconsistent orders in the case.<sup>58</sup>

Currently, federal laws on CPS, such as the Adoption Assistance and Child Welfare Act, encourage uniformity among state child protective services schemes from state to state by conditioning eligibility for federal funding on the establishment of various substantive criteria and procedural protections for children and parents. CPS proceedings are divided into four stages: investigation, adjudication, disposition and permanency, often with different rules and standards of proof depending on the stage of the proceeding and the nature and duration of the intervention. The Bill's language does not track that

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<sup>57</sup> To illustrate, in Philadelphia where I teach, a suspected case of child abuse may surface through the report of a mandatory reporter at a school or hospital, triggered by the Child Protective Services Law (CPSL) which provides emergency jurisdiction, but the dependency court takes continuing jurisdiction under the Juvenile Act, the provisions of which are slightly inconsistent with the CPSL. The same family involved in the CPSL/JA proceeding may also have come before a domestic violence judge in a quasi-criminal court applying the Protection from Abuse Act and issuing orders relating to custody and visitation. These orders may overlap with or be superseded by orders issued by a family court in the divorce and custody case. The duration of these orders and their significance varies from forum to forum, as may the standard of proof and criteria on which they are predicated.

<sup>58</sup> See PRESIDENTIAL WORKING GROUP ON THE NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICAN BAR ASSOCIATION, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 53-54 (1993) (discussing the need for a unified family court system).

of federal legislation relating to funding, or of local and state laws in the area of CPS and domestic violence, but would presumably preempt them. Neither CPS laws nor other emergency intervention schemes uniformly require a showing of probable cause for all "temporary or preliminary actions or orders" or a showing of clear and convincing evidence for all "final actions or orders or terminations of parental custody or visitation." Clear and convincing evidence is the constitutional standard for terminating parental rights, under *Santosky v. Kramer*,<sup>59</sup> but not necessarily for lesser invasions such as removal from a parent's custody or termination of visitation. The terminology of the Bill is strange. It is odd to speak of "terminating" parental custody or visitation, rather than "termination of parental rights." It is not unusual, however, for rights of custody or visitation to be suspended or limited for whatever period appears necessary to protect the child from harm.<sup>60</sup> The Bill seems to require a showing of clear and convincing evidence for such "terminations" of custody. While current laws may well require a showing of "clear necessity" in order to continue an emergency detention past the initial post removal hearing, CPS is authorized to obtain temporary orders of detention or require a physical examination of the child when there is reason to believe that a child is at risk of serious injury or is without proper parental care and supervision. The different standards reflect different judgments about the nature of the risk, the potential harm from an erroneous ruling, the private and state interests at stake, and so on.<sup>61</sup> Probable cause, the standard required to issue a criminal search warrant, is distinctly higher than the standards currently required by civil laws aimed at protection of children. Hot line calls from unidentified neighbors, unexplained bruises, and venereal disease in a young child are often sufficient to trigger an investigation.

## *2. The Bill Would Shift the Balance Towards Nonintervention in Cases of Suspected Abuse and Medical or Physical Neglect*

Critics argued as well that the Bill's provisions for attorneys' fees and for a federal cause of action would inevitably raise the costs to local communities of protecting children from abuse and physical or medical neglect. The Bill attempts, but fails, to effectively exempt abuse and neglect cases and medical decision-making from its scope. As a threshold matter, in order to determine whether a given claim falls within the Bill's scope, a court presented with a claim or defense under the Bill will have to decide whether a particular medical

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<sup>59</sup> 455 U.S. 745 (1982).

<sup>60</sup> A parent whose rights of physical custody or visitation have been limited or suspended generally retains other rights, including the right to make decisions about medical care, education, and religious training of the child.

<sup>61</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (describing three part test for determining what process is due in different circumstances).



decision results in "danger to the child's life" or in "serious physical injury." The court will need to determine whether a particular act "constitutes abuse and neglect as the terms have traditionally been defined" or is exempted as "reasonable corporal punishment." In effect, the Bill opens a wedge to challenge and relitigate the issues of medical decision-making and abuse and neglect, not only in the original case but potentially in a separate forum and a separate cause of action.

A hypothetical case illustrates the potential for liability under the proposed Act in a garden variety CPS case. A parent is ordered to have no contact with his daughter during the two week period during which charges of sexual abuse are being investigated. The investigation substantiates some arguably improper contact or activity (taking of nude photographs, for example) that falls short of clear-cut sexual abuse. The court dismisses its order and recommends family therapy. The Bill would seem to allow this prevailing parent a federal cause of action to litigate or perhaps relitigate the initial order, arguing it was based on less than probable cause, or that the acts in question were not abuse and neglect as traditionally defined, or that supervised visitation would have been a less restrictive means of accomplishing the government purpose. Should the parent prevail, he will be awarded attorney's fees. In any event, the litigation draws scarce CPS resources away from protection of children at risk and channels them into continuing litigation over good faith emergency interventions. Such cases would arguably have a strong chilling effect on attempts to protect vulnerable children from risks of serious harm. It is important to bear in mind the effect of increased institutional liability on decision-makers working with children. In child abuse school searches, adoption, and every other context, these decision-makers will be even more fearful than at present that an error on the side of intervening will result in large court awards of damages and attorney's fees. The Bill fails to balance adequately the magnitude of harms at stake. Agencies will inevitably make mistakes. A wrongful removal or usurpation of parental powers can be remedied, at least in part, by restoring the child promptly to his family or promptly restoring the parent's authority. Fear of intervening in those difficult, close cases may mean there is no child to put back in his family.

Attorney's fees awards in contexts like the Religious Freedom Restoration Act<sup>62</sup> are dwarfed by the figures on state protective interventions. Three million cases of child abuse are reported each year, and a large percentage, roughly one-third, are substantiated after investigation, even though the children may be too young to seek help or to testify and the acts usually occur without any witness present.<sup>63</sup> Over a thousand children die and hundreds of

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<sup>62</sup> 42 U.S.C. §§ 2000bb-1 to -4, 1988(b) (1988 & Supp. V 1993).

<sup>63</sup> Note that a case not listed as "substantiated" is not the equivalent of a false report. The standards for a finding substantiating a report are high, and the burden of proof is, of course, on the government agency. In many unsubstantiated cases, there is significant

thousands are hospitalized each year because of abuse and neglect. Each death is a tragedy, but each preventive intervention is a potential lawsuit under the Bill.

The case of *DeShaney v. Winnebago County*<sup>64</sup> illustrates how this legislation may exacerbate an existing imbalance.<sup>65</sup> In *DeShaney*, the CPS worker mistakenly decided not to remove Joshua DeShaney, a four year-old child, from his father's custody, although she had reason to believe he was being battered. The evidence of abuse (repeated unexplained bruises) was somewhat ambiguous, most likely falling short of probable cause and far short of clear and convincing evidence. Joshua was brutally beaten and remains severely disabled. His suit against the county for damages was rejected by the Supreme Court. The Court held that a child who is seriously or fatally injured because of nonintervention has no cause of action against the state even for gross negligence in failing to protect him from harm. The Court justified this conclusion by pointing out the thin line that agencies must tread between protecting children and protecting against lawsuits by their parents. The Bill would appear to further tip the delicate balance between over- and under-intervention described in Justice Rehnquist's opinion, since parents would have even more powerful remedies, while children continue to have none.

### 3. *The Bill Seeks to Narrow the Definition of Abuse and Neglect and to Freeze Future Developments into a "Traditional Understanding" of What Constitutes Abuse*

By using terms such as "traditionally defined" and "physical risk" the Bill attempts to distinguish necessary from overly intrusive interventions. This approach raises serious risks of impeding state and local government from responding to new scientific knowledge about child development and children at risk. In each case, courts must decide whether a particular parental act falls within the scope of the exception for abuse and neglect "as the terms have traditionally been defined." At the turn of the last century, traditional law allowed parents to put their young children to work in sweat shops and to discipline children by beating them with a stick no thicker than the parent's thumb, often inflicting serious bodily harm.<sup>66</sup> We now consider this sort of

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evidence that abuse did in fact occur and parents often accept voluntary services to deal with their violent behavior.

<sup>64</sup> 489 U.S. 189 (1989).

<sup>65</sup> See Amy Sinden, *In Search of Affirmative Duties Toward Children under a Post-DeShaney Constitution*, in CHILD, PARENT & STATE: LAW AND POLICY READER 141 (S. Randall Humm ed., 1994).

<sup>66</sup> See MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 103 (1994); Woodhouse, *supra* note 5, at 1046-47.

conduct to be a form of child abuse. In the past few decades, we have learned a tremendous amount about the effects on children of exposing them to risks ranging from domestic violence and pornography, to drugs, smoke, and alcohol in utero and during early childhood. We now understand that children can die from previously unidentified psychological causes such as "failure to thrive syndrome." Child sexual abuse, once believed to be rare, and best handled as a private family matter, has been identified as a serious public health problem affecting thousands of children's healthy development. Experience suggests that the Bill's drafters are mistaken in believing that referring to tradition or physical harm will somehow accomplish the goal of distinguishing valid interventions from wrongful interventions or necessary from unnecessary interventions. The Bill would have the effect of precluding law-makers at the state and local levels from responding to new learning regarding serious risks to children.

To illustrate, suppose a court removes a child from the home of parents who do not strike the child but who have violent physical fights with each other, resulting in blood shed and broken bones. Traditionally, courts considered violence between spouses to be irrelevant in determining whether a parent was "unfit" or whether a child was endangered.<sup>67</sup> Recent research, reviewed by the American Medical Association Journal, however, substantiates the physical and emotional harm to children from *witnessing* violence in the home.<sup>68</sup> Does the parent's conduct fall within the "traditional" definition of abuse? Is the child at risk, if not given appropriate therapy, of serious "physical" injury? What about cutting edge questions like parents' rights to preclude HIV testing of infants whose lives may be prolonged but not saved by treatment? Or current opposition to public health programs from measles immunization to condom distribution and education on "unsafe sex"? Tradition provides few answers to these questions, and the proposed legislation might have unintended effects on local governments' ability to respond to new and unforeseen crises.<sup>69</sup>

#### 4. *The Bill Suggests a Trend Toward Enlisting Public Institutions to the Job of Enforcing Individual Parent's Authority in Opposition to Institutional Goals*

The notion of the state as a substitute parent, when parenting resources have failed, is an old one, and goes by the name of *parens patriae*. Public

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<sup>67</sup> See Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1072-73 (1991).

<sup>68</sup> Division of Developmental & Behavioral Pediatrics, *Silent Victims: Children Who Witness Violence*, 269 JAMA 262 (1993).

<sup>69</sup> For example, the PTA fears the impact on school health programs, which would be reduced to adopting the least intrusive common denominator under this Bill.

institutions play a complementary role of partnership with parents, providing public education, public health services, and other collective goods benefiting families. Another model of child, parent, and state seems to be emerging from the conservative critiques of current law—a model in which parents seek to enlist the state as their agent to enforce parental choices, values, and authority. I have already discussed the *Sumey* case in which parents sought police assistance in enforcing their authority and then objected that the crisis intervention services decision in favor of temporary placement of the runaway teen usurped their parental authority. Of course, the power of parents to use the law to enforce their authority undergirds much of family law. The question remains what role public institutions and agents play in determining when parents' authority is not effective in controlling children and in determining when larger community goals and objective assessments of children's interests, while they might not warrant coercive intervention, still militate against enforcing the parent's choices. Another line of cases exposes the thin line between government respect for parents' authority and the co-opting of public institutions to enforce parental authority, regardless of any objective assessment of the child's interests. These are the cases touching on parents' rights to direct the education and moral and religious training of their children. Many of the medical decision cases cited by proponents also involved abortion, contraception, and "safe sex," medical decisions that are controversial precisely because they are so value laden and have so much to say about parents' rights and practical ability to control older children's sexual activities and moral conduct. These cases, in which parents seek to enlist public institutions to enforce parents' authority, are typified by *Curtis v. School Committee of Falmouth*,<sup>70</sup> a case in which students and parents brought an action for injunctive relief alleging that a program of condom availability established in the school violated their rights to familial privacy, parental liberty, and free exercise of religion. The program made condoms available on a voluntary basis via vending machines and on request from health counselors. The school did not offer any mechanism to prevent children whose parents objected to the program from obtaining condoms. The Massachusetts Supreme Judicial Court dismissed the claim, holding that the program was neither compulsory nor coercive—students were not required to read literature or participate in counseling, and parents were free to instruct their children not to participate, without any penalty to either student or parent. The Massachusetts court held that the program lacked any element of coercion and therefore did not abridge the parents' rights.

These examples suggest that the Bill's supporters envision a shift in current law, towards empowering parents to require government entities, such as schools and libraries, not only to refrain from compelling children to engage in

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<sup>70</sup> 652 N.E.2d 580 (Mass. 1995).

activities their parents oppose, but also to police the children and assist the parents in enforcing the family's specific prohibitions and values. Witnesses supporting the Bill testified that, once a parent demonstrated the school had usurped his authority by exposing his child to an idea or value which the parent opposed, thereby usurping the parent's right to train and educate his child, the new scheme would shift the burden to the school to show a compelling interest in inclusion of the material in its curriculum and to defend its choice as the least restrictive alternative. The burden would thus be upon the school to enforce individual parenting philosophies or survive a strict scrutiny test of their reasons for teaching a particular idea.<sup>71</sup> An example of co-opting public institutions came in the testimony of Wade F. Horn who cited as a usurpation of parental rights his local public library's policy (apparently based on a national library association's policies regarding patrons' privacy) of not disclosing titles of books taken out by card holders, even to the parents of minor cardholders.<sup>72</sup> The library's policy had forced the parent to supervise the children's borrowing himself and to take out on his own card any books they wished to borrow. Supporters of the Bill suggested it would empower this parent to require the library adopt practices, such as disclosure to parents of children's borrowing lists and policing of children's access to books. The library could not condition the child's unsupervised access on the parent's acceptance of the library's rules, but would be required to take over the parent's monitoring role and insure that the child would not be exposed to materials that the parent found objectionable. Under current laws, policy decisions about what books shall be available in local libraries and whether access shall be restricted by age generally reflect community sentiments and are influenced by parents' involvement in library operations. This conception of a legal duty to enforce the parent's preferences whenever the child uses public institutions represents a significant departure from current law, in which protections generally are triggered only when the state coercively invades the parent's domain of authority without offering an opportunity to opt out of the public program.<sup>73</sup>

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<sup>71</sup> See Peter Applebome, *Array of Opponents Battle Over 'Parental Rights' Bill*, N.Y. TIMES, May 1, 1996, at A1 (noting widespread concern that the PRRA of 1995 would produce educational gridlock).

<sup>72</sup> Wade F. Horn, Director of the National Fatherhood Initiative, Testimony before the House Judiciary Committee, Subcommittee on the Constitution (Oct. 26, 1995), available in LEXIS, Legis Library, Cngtst File.

<sup>73</sup> See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988).

### *5. The Bill's Ambiguities and Vagueness Would Create Confusion, and Lengthy Litigation Would Be Necessary to Clarify Its Meaning*

In addition to the changes in law discussed above, there are a number of ways in which the Bill might alter the dynamic within existing systems for child protection and education. The Bill's language is vague and ambiguous, and the process of clarification would result in harmful confusion at the local level and protracted and fiscally ruinous litigation. In an attempt to create a sweeping effect, the Bill uses language that is so broad and vague as to invite protracted litigation. For example, when is an action "temporary or preliminary" and when does it constitute a "final action or order"?<sup>74</sup> What does the Bill mean by orders that "terminate" visitation?<sup>75</sup> At the permanency planning stage, for example, suppose a court orders "permanent or long term foster care" for the child of a parent who is mentally ill but whose rights should not be terminated because he or she has a relationship with the child and has made every possible effort to maintain that relationship? The parent is not "guilty" of abuse or neglect, yet the child is in need of permanent substitute care. In order lawfully to enter this order, must the court have clear and convincing evidence? Of what? That the parent will not be able to function soon? Ever? That the parent's illness is a form of abuse or neglect? These issues are already raised by current laws, and different states have reached different conclusions about how to structure their own child protective schemes. The Bill seems to imagine a "common law tradition" but, in effect, would shift the development of legal principles to federal courts. In interpreting the Bill, it is unclear whether courts, state and federal, should draw upon state statutes, state common law principles, or articulate a federal common law of the family.

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<sup>74</sup> To illustrate the ambiguity created by attempting to distinguish between domestic relations disputes and state protective interventions, and between temporary orders generally and temporary orders terminating visitation or custody, consider a domestic violence court that enters a "stay away" order against a parent who has beaten or threatened serious violence to his child's mother or care giver (these courts often are open around the clock and routinely are asked to issue orders barring an abusive parent from a household where another parent, a common law partner, or a child's stepparent is caring for several small children). Is this a termination of custody or visitation such that the court dealing with family violence cases must have "clear and convincing evidence," before issuing such a protective order? Is the typical "protection from abuse order" issued at Philadelphia's "Roundhouse" a "dispute between parents" exempt under Section 7, or is it a state intrusion into parental prerogatives? And what if the party seeking the order is not a parent, but a stepparent or grandparent? Does the parent who has been excluded by the domestic violence court from seeing or residing with his child have a cause of action if the order is based on less than clear and convincing evidence?

<sup>75</sup> See H.R. 1946, § 3(1)(A),(B).

### III. THE BILL'S UNDERLYING PHILOSOPHY: A NARROW AND PRIVATIZED VISION OF FAMILY

#### A. *The Proposal Adopts a Narrow Vision of Family Life*

##### 1. *The Bill Focuses on Parents' Rights Rather Than Adopting a Broader Functional Vision of the Extended Family*

By privileging parents over other family members, the Bill could have tragic unintended consequences for children living with extended families. Many thousands of children throughout the country live in homes where the heads of family are grandparents or other extended family members or other non-parent care givers. In Philadelphia, observations in custody court suggest that as many grandmothers are caring for children at risk as are mothers and fathers. Not only does this legislation fail to protect these families, it opens the door to attacks by noncustodial biological parents against agencies who place children with their grandparents or seek orders allowing them to remain in grandparents' custody.

A common case pattern in Philadelphia and many other urban and rural areas involves a grandmother or aunt who has taken responsibility for a child whose mother has left her in the relative's custody, often since birth. The biological parent, either a mother or a father, would be given a strong weapon in this Bill to force agencies to remove children from these stable and happy homes.<sup>76</sup> This focus on the nuclear family is a lynch pin of the conservative agenda. However, current laws have been moving towards a more pragmatic and pluralistic definition of family that focuses on who is actually doing the care giving. In a community in which grandmother is the adult attending parent conferences or taking the sick child to the doctor, the focus on "parents" as defined by state law seems misguided as a matter of protecting the family's authority against state usurpation, and actually places the family at increased risk of state intervention.<sup>77</sup>

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<sup>76</sup> The cases of the Baldanza boys in New York City, whose crack addicted parents were able to disrupt the little boys' lives in the home of a devoted extended family member who had raised them since birth, and of two year old Lance Helms of Los Angeles, who was killed by his father's girlfriend after being removed from the home of an aunt who had raised him since infancy, illustrate the tragic effects of such a strong *parental* preference. See Letta Taylor, *Foster Battle Puts Two Lives in Limbo*, NEWSDAY, June 30, 1995, at 24; James Rainey, *Ayn Helms, 31; Fight to Save Nephew Led to Reform Effort*, L.A. TIMES, Sept. 23, 1995, at A22.

<sup>77</sup> See Woodhouse, *supra* note 8, at 2503-10 (arguing that many unnecessary state "interventions" in ongoing, functional families involve situations in which long absent or uninvolved biological parents seeking to regain custody from an extended family member or de facto parent call upon the state to enforce their "rights" by removing the child from his

Because of its narrow focus on “parents’” rights, as opposed to children’s and governmental interests, the Bill also would have a chilling effect on adoption. For example, it could provide a powerful weapon for unwed fathers who challenge adoptions, as in the cases of Baby Jessica, Baby Richard and Baby Emily. Recent cases have involved unwed biological fathers who successfully challenged adoptive placements of children, based on the argument that they did not know of the pregnancy or of the adoptive placement. Baby Jessica was almost three years old and Baby Richard was four when the families with whom they had lived since birth were ordered to surrender them to the biological fathers they had never met. Baby Emily was allowed to remain with her adoptive family, but the Florida Supreme Court stated in dicta that if the biological father (a convicted rapist) had not been found to have abandoned the mother, Baby Emily’s interest would have been treated as legally irrelevant. State courts upheld many of these fathers’ absolute custody rights, and these victorious fathers would now be eligible for reimbursement of their attorneys’ fees, in addition to return of the child. Many of the potential unwed father scenarios would deter adoption of babies who are especially at risk, born to teen mothers who chose adoption or whose rights were terminated because of drug addiction or abandonment, but where the father is unidentified or unknown at the time of placement.

To illustrate, suppose a man who fathered a child out of wedlock seeks to have the child’s adoption vacated. He claims he had only a casual relationship with the mother and was not aware of the pregnancy or the adoptive placement. The mother had refused to give the father’s name because she feared he was violent. The adoptive family presents evidence that the father has a criminal record for sexual assault. The court holds he has not waived his parental rights and that the rape conviction is irrelevant to his fitness as a father. Especially if the father could show involvement of a state agency, this case would seem to fall squarely within the provisions of the Bill. A “parent’s” rights to custody have been usurped unconstitutionally, and the parent—as the prevailing party—would be eligible for an award of attorneys’ fees.<sup>78</sup>

#### *B. The Bill Neglects Children’s Rights and is a Throwback to Turn of the Century Fears that Children’s Rights Lead to Anarchy*

Nowhere in the Bill is there any mention of children’s rights. This omission is astonishing, and most likely deliberate, given the supporters’ hostility to the notion of children’s rights, especially as embodied in the U.N.

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or her family setting).

<sup>78</sup> This case is a composite of the Baby Emily, Richard, and Jessica cases, and is an increasingly common scenario in courts throughout the nation. See Woodhouse, *supra* note 8, at 2515 (discussing these famous adoption cases).



Convention. Conservative critics have always viewed children's rights as inimical to parental authority.<sup>79</sup>

In some ways, this parents' rights initiative is a throwback to an earlier time when children's rights were viewed with mistrust, as a means of nationalizing the American child, and "replacing his real father with his father in Washington."<sup>80</sup> In fact, the apprehensions now being voiced over the U.N. Convention on the Rights of the Child draw upon images that were invoked to combat earlier movements for children's rights, only in those days the imagined enemy was a "Bolshevist" rather than a radical feminist or advocate of a New World Order. At the turn of the century, the movement to regulate child labor produced an angry outcry about government usurpation of parents' rightful authority. A struggle ensued between Congress and the conservative Supreme Court. After a federal child labor law was struck down in *Hammer v. Dagenhart*,<sup>81</sup> and a child labor tax met the same fate in *Bailey v. Drexel Furniture Co.*,<sup>82</sup> children's advocates proposed a Child Labor Amendment to the Constitution. Opponents of the Child Labor Amendment claimed that "under the guise of the amendment they will take charge of the children same as the Bolsheviks are doing in Russia."<sup>83</sup> They painted a picture of moral decay and democratic ruin that would inevitably flow from state interference in the traditional rights of parents to control their children's labor and vocational training. The Child Labor movement, it was feared, "was a menace to the family to the home and to . . . local self government" and would "destroy parental authority . . . [and] give irrevocable support to a rebellion of childhood."<sup>84</sup>

While these fears sound extravagant to modern ears when associated with rules against putting one's children to work for wages at age twelve or thirteen, they reflect the same deeply embedded apprehensions we hear voiced today with respect to children's rights. The idea that any public involvement in child protection, education, health and income support must inevitably erode the powers and unity of the family is not new—only the battlegrounds have changed. The myth remains powerful that the allocation of rights and responsibilities among children and parents and the State is a zero sum game—with any gains for either children's rights or the State's interest coming at the expense of the traditional family.

Contrary to these assumptions, children's rights to family relationships have provided a strong weapon in the arsenal for protecting family privacy.

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<sup>79</sup> See, e.g., Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267 (1995).

<sup>80</sup> Woodhouse, *supra* note 5, at 1066.

<sup>81</sup> 247 U.S. 251 (1918).

<sup>82</sup> 259 U.S. 20 (1922).

<sup>83</sup> See Woodhouse, *supra* note 5, at n.365.

<sup>84</sup> *Id.*

Advocates representing children in CPS cases are often instrumental in returning the child to his home or preventing a wrongful removal and in articulating children's interests in protection of their intimate family ties. Children's claims of rights to educational equality were crucial to the success of their parents' crusades to obtain schooling for immigrant children and children with special physical or educational needs, not to mention equality of education for children of all races.<sup>85</sup> At the turn of the last century, children's rights were an emerging and controversial concept. As we approach the year 2000, however, children's rights are expressly recognized both in American courts of law and in numerous international conventions and declarations of human rights. Any sweeping statement from Congress about parents' rights is incomplete and flawed if it fails to acknowledge and to protect children's complementary rights to family intimacy, as well as children's rights to protection from harm.

*D. The Vision of State-Family Relations Is Antagonistic and Adversarial, Rejecting the Notion of a Public-Private Partnership in Child Rearing*

Awards of attorney's fees would shift cases involving children away from a focus on cooperating to protect children's interests and towards a focus on the adversarial process. The present systems for dealing with issues involving children emphasize parents' and government's shared interests in the children's welfare. Often these cases can be resolved through mediation and cooperation. The existence of this federal cause of action would push attorneys to take an adversarial posture, with the government refusing to concede its own error and with attorneys for parents refusing to compromise and move forward in children's best interests.

The model on which the Bill is constructed, of implacable conflict between children's parents and the public institutions intended to serve children, is a sad one, and may work to the detriment of children, parents, and institutions. One of my former students, Cathy Miller, is an avid advocate for parents' rights, who believes most state interventions are evil and harmful. Nevertheless, Cathy reports that she can often use the system to her clients' advantage by enlisting the agency that wrongfully suspected her client of abuse or educational neglect to help obtain the housing, day care slot, or special education placement that the client really needs in order to make life better for her child. Cathy uses the Family Service Plan creatively and negotiates to help her clients get what they really need, rather than to vindicate their positions. If her livelihood depended on "winning" and the agency's budget depended on never "losing" or admitting it was wrong, these cases would drag on with great detriment to the

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<sup>85</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982); *Brown v. Board of Education*, 347 U.S. 483 (1954).

adults and especially the children involved.

These same adversarial themes carry over into the schooling and health contexts. Vicki Rafel, appearing for the National PTA, stressed the collaborative role that schools have played in nurturing children to adult citizenship. She voiced concern that collaborative efforts to improve children's health and educational attainments would be sabotaged and parents would disengage from the process, by denying this collaborative effort as an "infringement" of parents' rights.<sup>86</sup> To one who has studied turn of the century reactions to early public health and education initiatives like vaccination, mother-infant nutrition programs, and nursery and day care programs, these concerns ring true. Contemporary conservatives' objections to state support of services for families as an infringement of parents' prerogatives also have a familiar ring.

#### IV. ADVOCATING FOR A CHILD-CENTERED VISION OF PARENTS AND PUBLIC INSTITUTIONS AS PARTNERS

Ultimately, I keep returning to the question posed to us by the organizers of this symposium—why "responsible citizens should be obligated to cover the costs of irresponsible parenting." The Parental Rights and Responsibilities Act seems to be animated by an underlying conviction that they should not—that parenting is nobody's business but the parents'. My discussion suggests the need to challenge not only the antigovernment perspective that gives rise to the Parental Rights and Responsibilities Act, but to challenge the assumptions underlying a host of contemporary taxpayer questions about responsibility for children. As posed, the question assumes a sharp dichotomy between private and public spheres, between my children and your children. Parenting, it seems to say, is a private enterprise: I do not tell you what pastimes to pursue, nor do I ask you to pay for my private pursuits. Why, then, should I subsidize yours with my tax dollars? The question presumes as well that parenting is not only a private, but a discreet and essentially isolated activity. People are free to make their own decisions about procreation and child rearing. Responsible parenting is something that responsible citizens do to *their* children in the privacy of their own homes, while irresponsible parenting is something that irresponsible citizens do (or fail to do) to *their* kids, God knows where and when! Perhaps in the loneliness of latchkey living rooms, on the streets of Our Town after curfew or, worst of all, in crack houses and dope dens in some alien American ghetto. No wonder that we, the responsible taxpayers who pride ourselves on having only as many children as we can afford, are angry at those alien others who expect us to pick up the tab for their personal failures. We are the pigs who built our houses of bricks, and we see no good reason to let our feckless

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<sup>86</sup> Rafel, *supra* note 28, at 6.

brothers and sisters in when winter comes. Those who built their huts of sticks will have to go begging and must accept whatever conditions are attached to any hand-outs they get.

Responsible taxpayers are different. Our economic and material independence earns us the right to absolute privacy from state intrusion. Having built our own sturdy walls and baked our own bread, we have every right to slam the door on meddlesome outsiders who want to tell us how to raise our young. We need to keep those tax moneys in our own pockets for *our* children, forget about other people's children.

There is an alternative way of posing the same question, however. Rather than couching the question in terms of taxpayers' rights, parents' responsibilities, or the limits on governmental authority, I would pose the question as one of children's rights. I would start by situating personal and parental responsibility for children within the larger context of community—a starting point that I believe more accurately reflects the American taxpayer's real aspirations about justice for children.<sup>87</sup> Analytically, this vision requires several rhetorical moves or alterations of perspective. The first move breaks down the wall between citizens and children, by asserting that children are also citizens and future taxpayers—as yet too unformed to be classed as either responsible or irresponsible. The second move is to break down the sharp dichotomy between my children and your children, acknowledging that all children are *our* children. My third move, involves defending, as a matter of children's rights, the public role in the private family. Children have “needs-based rights” to all of our care, rights that flow not from children's autonomy but from their dependency. Because children—mine and yours—are *not* autonomous independent actors responsible for their own survival, they must rely on all of us. While neighborhoods, religious communities, informal fostering, adoption, and charities all play significant roles in the safety net for children, the buck stops with the State. The State must act in its *parens patriae* role, when the adults in children's lives are unable, refuse, or just need a helping hand in providing responsible parenting.

Our future as a society depends on acknowledging and shouldering not only our individual responsibility to our own children, but also a shared responsibility for all American children. This is true not only as a moral matter, but as a pragmatic reality. Families do not exist in a vacuum, but are

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<sup>87</sup> See, e.g. Clifford M. Johnson, Director of Programs and Policy for the Children's Defense Fund, Testimony before the House Ways and Means Committee, Subcommittee on Human Resources, at Attachment 3 (Feb. 2, 1995), available in LEXIS, Legis Library, Cngtst File (citing a variety of polls showing that 65% of Americans believe it is “government's responsibility to take care of people who can't take care of themselves”; 80% “support government's responsibility to eliminate poverty”; and 70% “would increase federal spending on poor children, [while] another 20 percent would keep spending the same as now”).

embedded in their societies and deserve support because they are its only source of self renewal. Responsible parenting is something that we learn to do, in part, from our own parents and, in part, from the extended families, neighborhoods, religious, and political communities that shaped our parents' parenting and in which our own parenting is necessarily embedded. All these communities play an important role in modeling a collective concern for children and in fostering our capacities to care for our own, as well as for other people's children. They play a role as well in protecting our children from harm and in marking out the point at which parents' rights to privacy begin to intrude on the rights of children and on the compelling interests of the community in the welfare of all its children. Why should responsible taxpayers shoulder the costs of irresponsible parenting? Because children cannot. In order to avoid the high costs to society and the even higher costs to individual children, our social and political institutions must continue to play a positive and supportive role in creating family-friendly communities and in fostering the responsible parenting on which our children's lives depend.

Would the angry taxpayers whose frustrations were articulated above be persuaded? Would the members of the Christian Coalition be persuaded? So much lies in the way one constructs the question. Try asking the woman and man in the street what they would do if they opened their door one morning to discover a hungry and homeless four year-old huddled on their steps, or came upon a parent brutally beating a two year-old with a belt. I expect few would shut the door and go in to breakfast, or turn their heads and walk on by. I also expect, however, that their plans for coping with these hypothetical emergencies would assume a set of institutions through which other citizens besides themselves could share in a collective, public responsibility for responding to children's needs for shelter, education, and protection from harm. Americans may rail against AFDC, but they would not want to live in a society that offered no middle ground between legally adopting that four year-old child and slamming the door in his face.

Faced unequivocally with the drastic consequences for children of deregulation and privatization, most American taxpayers would probably be appalled.<sup>88</sup> Justifications based on enforcing personal responsibility fail in application to children who are not responsible for their plight. Nevertheless, most Americans believe that responsibility for children begins with parents, in the privacy of the home, and that parents must have rights that match their weighty responsibilities.

The struggle to strike the proper balance between family privacy and

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<sup>88</sup> I attended a conference at which an advocate for children pressed a free market economist to describe the consequences of total deregulation and privatization of the family, and I recall the gasp that greeted the economist's admission that "Of course, some children will die." He acknowledged that it might take time for parents to learn the lessons of free market economics and begin to limit the production of children.

responsibility for children continues, at the time of this writing, as the Senate prepares to consider an Amendment to the Parental Rights and Responsibilities Act.<sup>89</sup> The Amendment attempts to address some of the concerns expressed by child protection agencies and educators. It modifies the definition of medical neglect to include "imminent risk of serious harm," acknowledging that some harms are not "physical" and also provides for an administrative procedure that must be filed by parents before they can file a federal court action. However, under the Amendment's Section 6(b)(C), during 90 days pending the administrative hearing, the school or social services agency or other state entity is required to suspend whatever government action is being challenged by the parent. This change further exacerbates the risk of educational gridlock and harm to children at risk feared by critics like the CWA, PTA and NEA.<sup>90</sup> The Amendment attempts to insure that the Act would not apply to cases of abuse, but leaves open the loopholes mentioned above regarding whether abuse is exempt as "reasonable corporal punishment" and whether withholding of medical treatment is exempt because it does not pose "imminent risk of serious harm." Most disturbing, while the Amendment would delete much of the language about the threat to parents' rights, it still contains no language acknowledging the equal importance of children's rights or the duty of government to protect all members of the family. And it is still predicated on a vision of absolute parental right untempered by a shared sense of public responsibility for all our children. H.R. 1946 and the responses to it add another chapter to the history of our national struggle to reach an equilibrium that links parent, child, and state in constructive bonds of reciprocal responsibility and reciprocal respect.

This Inaugural Conference of the Justice for Children Project poses a question that typifies contemporary public debate. It starts with the word "Taxpayers." "Taxpayers," the Conference sponsors suggest, "are demanding an answer to this basic question: If people are free to have as many children as they wish, regardless of their ability to support their children's needs, then why should responsible citizens be obligated to cover the costs of irresponsible parenthood?"<sup>91</sup> As I have shown, the question hides a number of latent assumptions that deserve our undivided attention. It also taps into a long history of political debate, in which tensions between the individual and the

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<sup>89</sup> The Amendment, proposed by Sen. Grassley and titled "The Parental Rights and Responsibilities Act of 1996", is reproduced in Appendix B. It has been reported out of subcommittee and awaits consideration by the Senate Judiciary Committee as this Article goes to print.

<sup>90</sup> Ordinarily, a court will not issue an injunction without a showing of irreparable harm to the party seeking the injunction.

<sup>91</sup> THE OHIO STATE UNIVERSITY COLLEGE OF LAW, JUSTICE FOR CHILDREN PROJECT (1995) (announcing the Inaugural Conference of the Justice for Children Project and inviting public participation) (on file with the *Ohio State Law Journal*).

community, between freedom and responsibility have been played out in disputes about public versus private responsibility for children's welfare.

## Appendix A

### Proposed Parental Rights and Responsibilities Act, H.R. 1946

#### A Bill

To protect the fundamental right of a parent to direct the upbringing of a child,  
and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States  
of America in Congress assembled,

#### Section 1. Short Title.

This Act may be cited as the "Parental Rights and Responsibilities Act of 1995."

#### Section 2. Findings And Purposes.

(a) Findings. - Congress finds that -

(1) the Supreme Court has regarded the right of parents to direct the upbringing of their children as a fundamental right implicit in the concept of ordered liberty within the 14th Amendment to the Constitution of the United States, as specified in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925);

(2) the role of parents in the raising and rearing of their children is of inestimable value and deserving of both praise and protection by all levels of government;

(3) the tradition of western civilization recognizes that parents have the responsibility to love, nurture, train, and protect their children;

(4) some decisions of federal and state courts have treated the right of parents not as a fundamental right but as a nonfundamental right, resulting in an improper standard of judicial review being applied to government conduct that adversely affects parental rights and prerogatives;

(5) parents face increasing intrusions into their legitimate decisions and prerogatives by government agencies in situations that do not involve traditional understandings of abuse or neglect but simply are a conflict of parenting philosophies;

(6) governments should not interfere in the decisions and actions of parents without compelling justification; and

(7) the traditional 4-step process used by courts to evaluate cases concerning the right of parents described in paragraph (1) appropriately



balances the interests of parents, children, and government.

(b) Purposes. - The purposes of this Act are -

(1) to protect the right of parents to direct the upbringing of their children as a fundamental right;

(2) to protect children from abuse and neglect as the terms have been traditionally defined and applied in statutory law, such protection being a compelling government interest;

(3) while protecting the rights of parents, to acknowledge that the rights involve responsibilities and specifically that parents have the responsibility to see that their children are educated, for the purposes of literacy and self-sufficiency, as specifies by the Supreme Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972);

(4) to preserve the common law tradition that allows parental choices to prevail in a health care decision for a child unless, by neglect or refusal, the parental decision will result in danger to the child's life or result in serious physical injury of the child;

(5) to fix a standard of judicial review for parental rights, leaving to the court the application of the rights in particular cases based on the facts of the cases and law as applied to the facts; and

(6) to reestablish a 4-step process to evaluate cases concerning the right of parents described in paragraph (1) that -

(A) requires a parent to initially demonstrate that -

(i) the action in question arises from the right of the parent to direct the upbringing of a child; and

(ii) a government has interfered with or usurped the right; and

(B) shifts the burdens of production and persuasion to the government to demonstrate that -

(i) the interference or usurpation is essential to accomplish a compelling governmental interest; and

(ii) the method of intervention or usurpation used by the government is the least restrictive means of accomplishing the compelling interest.

### Section 3. Definitions.

As used in this Act:

(1) Appropriate evidence. - The term "appropriate evidence" means -

(A) for a case in which a government seeks a temporary or preliminary action or order, except cases which terminate parental custody or visitation, evidence that demonstrates probable cause; and

(B) for a case in which the government seeks a final action or order, or in which it seeks to terminate parental custody or visitation, clear and convincing evidence.

- (2) Child. - The term "child" has the meaning provided by state law.
- (3) Parent. - The term "parent" has the meaning provided by state law.
- (4) Right of a parent to direct the upbringing of a child. -
  - (A) In general. - The term "right to direct the upbringing of a child" includes, but is not limited to a right of a parent regarding -
    - (i) directing or providing for the education of the child;
    - (ii) making a health care decision for the child, except as provided in subparagraph (B);
    - (iii) disciplining the child, including reasonable corporal discipline, except as provided in subparagraph (C); and
    - (iv) directing or providing for the religious teaching of the child.
  - (B) No application to parental decisions on health care. - The term "right of a parent to direct the upbringing of a child" shall not include a right of a parent to make a decision on health care for the child that, by neglect or refusal, will result in danger to the life of the child or in serious physical injury to the child.
  - (C) No application to abuse and neglect. - The term "right of a parent to direct the upbringing of a child" shall not include a right of a parent to act or refrain from acting in a manner that constitutes abuse or neglect of a child, as the terms have traditionally been defined.
- (5) State. - The term "state" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States.

#### Section 4. Prohibition On Interfering With Or Usurping Rights Of Parents.

No Federal, State, or local government, or any official of such a government acting under color of law, shall interfere with or usurp the right of a parent to direct the upbringing of the child of the parent.

#### Section 5. Strict Scrutiny.

No exception to section 4 shall be permitted, unless the government or official is able to demonstrate, by appropriate evidence, that the interference or usurpation is essential to accomplish a compelling governmental interest and is narrowly drawn or applied in a manner that is the least restrictive means of accomplishing the compelling interest.

#### Section 6. Claim Or Defense.

Any parent may raise a violation of this Act in an action in a Federal or State court, or before an administrative tribunal, of appropriate jurisdiction as a

claim or defense.

#### **Section 7. Domestic Relations Cases And Disputes Between Parents.**

This Act shall not apply to -

- (1) domestic relations cases concerning the appointment of parental rights between parents in custody disputes; or
- (2) any other dispute between parents.

#### **Section 8. Attorney's Fees**

Subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988 (b) and (c)) (concerning the award of attorney's and expert fees) shall apply to cases brought or defended under this Act. A person who uses this Act to defend against a suit by a government by section 4 shall be construed to be the plaintiff for the purposes of the application of such subsections.

## Appendix B

### **Proposed Amendment to the Proposed Parental Rights and Responsibilities Act, S.984**

Amendment in the Nature of a Substitute Intended  
to be Proposed by Mr. Grassley

Viz:

Strike all after the enacting clause and insert the following:

#### **Section 1. Short Title.**

This Act may be cited as the “Parental Rights and Responsibilities Act of 1996.”

#### **Section 2. Purpose.**

The purpose of this Act is to enforce, pursuant to section 5 of the 14th amendment to the Constitution, the provisions of the 14th amendment, as enunciated by the Supreme Court, protecting the right of the parent to direct the upbringing of the child of the parent.

#### **Section 3. Definitions.**

As used in this Act:

(1) Child. - The term “child” has the meaning provided by the domestic relations statute of the appropriate State.

(2) Demonstrate. - The term “demonstrate” means meet the burdens of going forward with evidence and of persuasion.

(3) Direct the Upbringing of a Child. -

(A) In General. - The term “direct the upbringing of a child” includes, but is not limited to -

(i) directing or providing for the education of the child;

(ii) making a health or mental health care decision for the child, except as provided in subparagraph (B);

(iii) disciplining the child, including reasonable corporal discipline;  
and

(iv) directing or providing for the religious teaching of the child.

(B) Limitations Concerning Parental Decisions on Health Care. - The

term "direct the upbringing of the child" includes withholding consent for any medical service or treatment for the child, except for -

- (i) a medical service treatment that is necessary to prevent an imminent risk of serious harm, or remedy serious harm, to the child; or
- (ii) a medically indicated service or treatment for a disabled infant with a life-threatening condition.

(4) Parent. - The term "parent" has the meaning provided in the domestic relations statute of the appropriate State.

(5) State. - The term "State" means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

#### Section 4. Prohibition on Interfering with or Usurping Rights of Parents.

No Federal, State, or local government, or any official of such a government acting under color of law, shall interfere with or usurp the right of a parent to direct the upbringing of the child of the parent.

#### Section 5. Strict Scrutiny.

No exception to section 4 shall be permitted, unless the government or official is able to demonstrate, by clear and convincing evidence, that the interference or usurpation is essential to accomplish a compelling governmental interest and is narrowly drawn or applied in a manner that is the least restrictive means of accomplishing the compelling interest.

#### Section 6. Claim Or Defense.

(a) In general. - Any parent may raise a violation of this Act in an action in a Federal or State court, or before an administrative tribunal, of appropriate jurisdiction as a claim or defense.

(b) Exhaustion of Remedies. -

(1) Requirements. - Before a person may bring an action under this Act with respect to a government action that interferes with or usurps parental rights, if the agency carrying on the government action -

(A) provides an administrative remedy concerning the government action;

(B) provides effective written notice to the person of the administrative procedure associated with the remedy; and

(C) suspends the government action, and related adverse action, until

the conclusion of the administrative procedure;  
the person shall exhaust the administrative remedy.

(2) Time Limitation. - The person shall be considered to have exhausted the administrative remedy on the 90th day after the date on which the person initiates the administrative procedure referred to in paragraph (1) if the agency has not concluded the administrative procedure.

## Section 7. Exclusions.

This Act shall not apply to -

(1) a domestic relations case concerning the appointment of parental rights between parents in a custody dispute; or

(2) any other litigation between parents or legally appointed custodians;

(3)(A) any action to terminate parental rights with respect to a child who has been determined by a court of appropriate jurisdiction to be abandoned, abused, or neglected; or

(B) any adoption proceeding with respect to such child; or

(4)(A) any action concerning abandonment or neglect (as such terms are defined by State statute) of a child; and

(B) any action concerning abuse (as such term is defined by State statute) of a child, except as specifically provided in section (3)(3)(A).

## Section 8. Attorney's Fees

Subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988 (b) and (c)) (concerning the award of attorney's and expert fees) shall apply to cases brought or defended under this Act.

## Section 9. Applicability

(a) In General. - This Act applies to all Federal, State, and local law, and the implementation of such law, whether statutory or otherwise, and whether adopted before or after the date of enactment of this Act.

(b) Rules of Construction. -

(1) Constitutional Claims and Defenses. - Nothing in this Act shall be construed to limit any constitutional claim or defense that a parent may have in a case involving abuse or neglect.

(2) State or Local Protections. - Nothing in this Act shall be construed to limit the ability of a State or local government, or any official of such a government acting under color of law, from granting greater protection to the right of a parent to direct the upbringing of a child than is afforded by this Act.